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Supreme Court of the United States

October Term, 1945. No. 885.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,
Petitioner,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,
and
BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,
Respondents.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C. I. O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of the United Railroad Workers of America, C. I. O., respectfully represents:

This union has herewith filed this petition for leave to intervene in these proceedings because of the extreme importance and frequency of incidence of the issues raised in this case. Inasmuch as thousands of railroad workers are injured and suits are therefore instituted in United States District Courts for trial, under the Federal Employers Liability Act, 45 U. S. C. A., 51 et seq., and under the various Safety Appliance Acts, 45 U. S. C. A., 1-16 and 23, inclusive, the problem of preparing the case for trial is constantly present.

The federal rules of civil procedure pertaining to discovery admittedly were written with a view toward eliminating the adversary system. They were directed toward facilitating and assuring the ascertainment of all facts pertaining to each case, so that causes of action would be decided not upon mere superiority of opportunity to investigate the factual situation, but upon all of the facts by whomsoever they might have been developed.

In that manner it was hoped that each case would be fairly and squarely tried upon all of the proper and relevant evidence known to all of the parties in advance of trial, eliminating thereby all elements of surprise in the actual trial of the case.

The decision of the District Court in this case, recognizing the true purpose of the rules, held that whether the investigation was made by counsel or persons under him, or by the insurance company through its claim department, the information thus obtained was subject to discovery under the federal rules of discovery.

The so-called "privilege" claimed by counsel can well be-

come a tool to emasculate the rules and to turn them into meaningless words. We believe that the Circuit Court of Appeals, Third District, has by its decision now made it possible for insurance, steamship and railroad companies, and others, to hide behind the alleged cloak of privilege pertaining to counsel, and thus wipe out all gains that have been made up to now in discovery procedure, which had proven so invaluable in arriving at a fair and complete trial in each case.

In point of fact, the instant case is indicative of the intention of insurance carriers and common carriers to use this alleged veil of privilege, arising out of the assignment of counsel as supervisor of investigation, as a means of hiding and suppressing vital information necessary to the proper preparation and presentation of personal injury cases.

In fact, the investigation made on behalf of the injured employee is always made under the direction of his attorney and the alleged privilege would seemingly extend to the plaintiff as well as the defendant. Those who represent employee unions and try these cases, however, do not desire nor covet this protection. They want the cases tried with all of the facts in the case presented to the Court and jury with the chips falling where they may.

We cannot stress too strongly our thoughts upon this subject. Railroad employees, when injured, usually suffer very severe and disabling injuries requiring hospitalization. Very frequently head injuries are sustained that blot out from the memory of the injured all recollection of the manner of the occurrence. While the injured lingers in the hospital for months without friends or kin in the community to assist him in obtaining information, the insurance, steamship and railroad companies immediately round up the witnesses, take statements, learn of obscure facts that have extreme legal significance and otherwise prepare the case in anticipation of a law suit in the future. Such diligence is not criticized. It is our thought, however, that this Court intended all information obtained by anyone from whatso-

ever source relevant to the occurrence, to be available for all parties in the case. Since it is conceded that had this investigation been made under the auspices of the claim department by the various defendants that under the rules it would have been made available to the injured, we believe the presence of counsel should not make any difference.

We respectfully submit that there must not be retrogression in judicial procedure from the advances made under the rules of discovery. We believe the procedural law can be as important as the substantive law. We believe that all of the liberal advances intended by Congress on behalf of railroad employees and seamen, and so strongly interpreted by this Court, can be totally lost and destroyed by the ruling of the Circuit Court in this case. What avail is it to the injured employee to have liberal legislation in his favor if the facts by which he must establish a cause of action thereunder are suppressed by means of this devious privilege claimed?

We feel that this issue is of extraordinary importance. This Court must recognize that before cases can be presented to it upon given facts, that these facts must first be developed by interrogation of witnesses who are not easily found, and whose continued employment by the defendants renders them hostile.

In the days before the federal rules of discovery were enacted, it was a harum-scarum battle between the parties. Witnesses were hidden from the plaintiff, surprise witnesses were pulled out of the hat, with no advance opportunity for the adversary to learn of their identity or to check on the truth of their testimony, or to rebut the same upon such short notice at the trial. We must never return to those days.

The exception created by the decision of the Circuit Court in favor of privilege extending over the "work product" of counsel may have appeared to the Court below as an innocuous and well intended exception. Already we have seen it expand, and soon we shall be able to obtain no in-

formation in advance of trial, as each of the defendants has, or will provide itself with counsel, and the alleged privilege of counsel's "work product" will be used as a protective device, to silence all tongues and suppress all evidence.

Because the opportunity to challenge this rule in this Court probably will never come again, since ordinarily decisions on the rules are of an interlocutory nature, because in each and every case tried in the United States Courts this question must recur, because of the extreme hardship which this decision will inevitably work upon workingmen throughout the Nation, we respectfully submit that we should have some final word from this Court as to the meaning of these rules.

If the creation of these rules were of sufficient importance to warrant the appointment of a committee composed of eminent judges and lawyers throughout the country to bring them into being, with all of the months of study and effort expended on them, it seems to us that their "work product" should be of sufficient importance to warrant this Court devoting time toward considering them, so that litigants in Federal Courts may know just what they mean and what rights are created under them.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
B. NATHANIEL RICHTER,
Counsel for United Railroad Workers of America, C. I. O., Amicus Curiae.

BRIEF AMICUS CURIAE

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In The

Supreme Court of the United States

No. 47 October Term, 1946.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,
Petitioner,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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FACTS

The facts have been set out in full in petitioner's brief; and, therefore, they will not be repeated here.

QUESTION PRESENTED

The only question presented by this case is whether the statements, oral and written, and the facts obtained by an attorney on behalf of his client from third persons not connected with his client are "privileged" and hence exempt from the discovery provisions of the Rules of Civil Procedure.

ARGUMENT

This brief of the United Railroad Workers of America, C.I.O., *amici curiae*, endorses fully the views presented in petitioner's brief. This brief is intended, first, to stress the crucial restrictions which would be imposed upon the rights of hundreds of thousands of railroad workers to recover under the Federal Employers' Liability Act, if the decision of the Circuit Court is sustained; second, it is intended to approve and supplement the legal arguments advanced in petitioner's brief, but to avoid repetition thereof.

1. THE CIRCUIT COURT DECISION SERIOUSLY UNDERMINES THE RIGHTS CONFERRED BY THE FEDERAL EMPLOYERS' LIABILITY ACT.

Thousands of railroad workers are killed or injured annually on the nation's railroads because of the negligence of their employers or fellow servants. If a railroad worker is killed, his family usually knows little or nothing about the facts surrounding his death. Even if he survives, it is scarcely possible that at the time of the accident he will be favorably enough placed and sufficiently astute to record or catalog the events leading to his injury and to seek out witnesses. In many instances, orders, policies or movements leading to or causing his injury emanate from offices of train dispatchers or other employees located many miles from the scene of the accident, and the injured employee cannot, unaided, know or ascertain the source. When the time arrives to institute litigation, his recollection on many circumstances may be hazy. Head injuries may block out from the memory of the injured all recollection of the manner of the occurrence of his injury. Witnesses, even if he recalls them, may have been transferred to other areas, may have died, or may otherwise have become unavailable. Even if they be available, it is a notorious fact that, at least in the past, employees have been discouraged, if not prevented by intimi-

dation, from disclosing evidence of the railroad's negligence. Fear of loss of employment can be an effective restraining force. Indeed, Congress, itself, has taken cognizance of the reality of these deterrents to full disclosure. (See 45 U.S.C.A. 60). An employee witnessing an accident may initially make a candid and full statement to the railroad's investigators. But whether, after deliberation and possible hints or suggestions, he will later make similar unrestrained disclosures, if hurtful to his employer's defense, in favor of the injured employee, is not beyond doubt. Unless the injured employee has access to copies of those initial statements, essential evidence may have been put forever out of his reach.

In short, because of the peculiar relationship between employer and employee in railroad cases, to sustain an action under the Federal Employers' Liability Act, the injured worker, unlike the ordinary plaintiff in a tort case, is largely dependent upon the discovery procedures established by Rules 26-34 of the Federal Rules. Obviously, any weakening of these rules inevitably and irremediably will hamper him in his efforts to obtain redress.

On the other hand, it goes without saying that while an injured employee lingers in a hospital, perhaps for months, without friends to assist him in obtaining necessary information, insurance, steamship and railroad companies, operating through carefully trained and already-established staffs of investigators, lose no time in launching thorough investigations which include the rounding up of witnesses, the taking of statements and the thorough preparation of their defense.

That diligence on the part of defendants is not criticized. However, it is submitted, both the letter and the spirit of the discovery rules require the disclosure of the facts found by these investigators.

The discovery provisions of the Federal Rules of Civil Procedure were directed toward the elimination of the practice of dealing with a law suit as though it were a

game, a battle of wits between attorneys, while clients sat on the sidelines cheering the outcome. The discovery provisions were adopted and devised to enable parties who do not have the investigative resources of the large corporate defendants to obtain all the facts of their cases simply and inexpensively. In view of the fact that information about railroad accidents is usually peculiarly and principally, if not always exclusively, within the control of the defendant railroad or steamship company or its insurance carrier, it would be sheer mockery to extend to injured employees the benefits of the Federal Employers' Liability Act, but at the same time withhold from them the sole means of proving their case, by technical and ingenuous emasculation of the discovery rules.

Even a casual glance at the decisions under the discovery rules, as conceded by the opinion below, will reveal that many district courts, immune from review because of the usually interlocutory nature of decisions on discovery rules, have in many instances set up difficult barriers apart from those created by the opinion below. (See, for example, the lower court's reference to cases denying discovery for alleged non-compliance with the vague requirements of "good cause" under Rule 34. Compare Gordon v. Pennsylvania R. R., decided by Judge Kalodner in the Pennsylvania Eastern District on Aug. 15, 1946 (No. 5443) in which the Court held it could not find "good cause" for a request that defendant disclose to plaintiff his own statement taken from him, after the accident, by defendant.) But, the decision below, extending the attorney-client privilege, with its novel "work-product" rule, places in the hands of defendants a device with which to frustrate almost completely any and all attempts at discovery, even as to matters formerly conceded to be subject to discovery.

In our previous brief supporting the petition for a writ of certiorari, we said:

> "In point of fact, the instant case is indicative of the intention of insurance carriers and common carriers

to use this alleged veil of privilege, arising out of the assignment of counsel as supervisor of investigation, as a means of hiding and suppressing vital information necessary to the proper preparation and presentation of personal injury cases . . . The exception created by the decision of the Circuit Court in favor of privilege extending over the 'work product' of counsel may have appeared to the Court below as an innocuous and well intended exception. Already we have seen it expand, and soon we shall be able to obtain no information in advance of trial, as each of the defendants has, or will provide itself with counsel, and the alleged privilege of counsel's 'work product' will be used as a protective device, to silence all tongues and suppr s all evidence."

Our prediction that defendant railroads would use the extension of the attorney-client privilege and the "work-product" rule as a device to circumvent the discovery rules was no idle fear. Indeed, this concealment, which we foresaw as inevitable, has already become the stated policy of the very railroad involved in this case. As concrete evidence, we submit the following letter admittedly written by defendant railroad's General Counsel to all of its General Claim Agents. This letter is reported in the Court's opinion in DUGGER v. BALTIMORE & O. R. CO., 5 F.R.D. 334, (D.C.E.D., N.Y., 1946). We take the liberty of quoting this letter in full because it reveals dramatically the use to which defendants are already seeking to put the vaunted attorney-client privilege:

"May 22, 1945

"Mr. P. C. Garrott
"Mr. E. L. Williams
"General Claim Agents

"Gentlemen:

"All investigations made by you or any of the Claim Agents under the authority of you or either of you, all

statements taken from or made by any and all persons whether employees of The Baltimore and Ohio Railroad Company or not, relating to any accidents or damage to property, or other damages, and all reports made by any of your Claim Agents to you, whether such investigations were heretofore made or shall hereafter be made, shall be taken and held to be and to have been taken and made for the confidential use of the Law Department of the Baltimore and Ohio Railroad Company, and shall at all times be treated by you and all of your Claim Agents as confidential.

"All such investigations shall be made, such statements shall be taken and made, and all such reports shall be made in order to enable the Law Department to determine questions of liability in the case of every accident, in contemplation of possible or threatened litigation, in preparation for the defense of litigation either threatened, contemplated, or pending, and to enable the Law Department to give advice with respect to the settlements or defense of any and all claims that may arise against the Railroad Company as the result of such accident.

"Very truly yours,
"J. J. Cornwell
"General Counsel"

Obviously, if the lower court's decision is sustained and if hereafter every scintilla of evidence obtained by railroads in their investigations is treated as being taken confidentially by and for counsel, there would be absolutely nothing which an injured employee could ask for under the discovery rules. Having ascertained the identity of the witnesses to the company's negligence, the defendant, by the expedient of letting counsel take a statement from such witnesses, could effectively withhold from plaintiff all chance of determining even the existence or identity of essential witnesses. By the simple device of writing such a letter, as in the DUGGER case, all railroad, steamship and insurance companies could almost literally thumb

their noses at every discovery rule, under virtually any circumstances. Plaintiff's burden of proving negligence normally, if not invariably, would be an impossible task.

2. THE DECISION OF THE COURT IS NOT SUPPORTED BY AUTHORITY.

As already stated, while we fully endorse the legal views expressed in the brief of the petitioner, we shall not burden the Court with repetition; we seek only to supplement. We cannot forebear, however, from pointing out that the decision below has been distinctly disapproved by the Advisory Committee on Rules of Civil Procedure. Certainly, it would seem that if any one body is in a position to declare the purpose and intent of the Rules of Procedure and to determine whether the decision below is consistent therewith, that one body is the Advisory Committee on the Rules.

Walter P. Armstrong, former president of the American Bar Association, writing specifically about the instant case (See Armstrong, Report of the Advisory Committee on Federal Rules, 156 F 2d XIX, at Page XXXV) states:

> "In his opinion Judge Herbert F. Goodrich declared that the statements were not privileged under the testimonial rule, which excludes confidential communication between client and attorney; he held, however, that Rule 26 expressly limits the scope of examination to matters 'not privileged' and that 'privileged' used in this connection has a broader meaning than testimonial exclusion and extends to 'the work product' of the lawyer, such as the statements in question. *The Committee criticizes the decision and opinion in Hickman v. Taylor: 'The Advisory Committee, one member disagreeing, questions the view in Hickman v. Taylor, supra, that the word 'privileged' in Rule 26 (b) encompassed the situation before the court in that case. The Committee believes that the term*

'privileged' as used in that rule was not designated to include anything more than that embraced within the rule of testimonial exclusion regarding privileged communications as developed under the applicable laws of evidence, both common-law and statutory.'" (emphasis ours)

Mr. Armstrong then points out (at Page XXXVI) that in order to remove all doubts of its disapproval of the Hickman case, the Committee has proposed an amendment [1] to the rules. The purpose [2] of this amendment he epitomizes as follows:

> "Probably one of its (the amendment's) primary purposes was, in exceptional cases, to *broaden* the right of discovery beyond the limitation imposed by Hickman v. Taylor. Yet its approach is negative . . . *The clear implication is that in the cases of hardship provided for, statements of witnesses and other similar objective preparations for trial are discoverable even when they are the "work product" of a lawyer.*" (emphasis ours)

(1) The proposed amendment is as follows:

"The courts shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinion, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."

(2) While Mr. Armstrong insists that the purpose of this amendment was to *broaden* the right of discovery beyond the limitation imposed by HICKMAN v. TAYLOR, he concedes that the draftsmanship of this amendment leaves "something to be desired" because "its approach is negative" (Armstrong, supra, at Page XXXVI). He adds:

> "It might have been better if the Rule had been both affirmatively and negatively stated and added to the scope of the examination definition in Rule 26, or if the scope of examination with this addition had been placed in a separate Rule and this Rule made expressly applicable to discovery under Rules 26, 33 and 34."

As Mr. Armstrong notes, it is "unfortunate" that there has been and there will be no opportunity for general discussion on this proposed amendment, it having been already released. While the purpose of the amendment, as stated by Mr. Armstrong, is appreciated, we join with

Professor Edmund Morgan, one of the leading writers on the Law of Evidence, the Reporter for the Model Code of Evidence, and a member of the Advisory Committee, says the following about the HICKMAN case: (MORGAN, LAW OF EVIDENCE, 1941-1945, 59 Harv. L. Rev. 481, 517-19)

> "The destruction of the notion of a lawsuit as a sort of intellectual duel comes slowly and painfully. But the right to hold back relevant material so as to surprise the opponent at the trial and to refuse to disclose the existence and content of evidence favorable to him is being challenged. . . . The most liberal provisions for discovery in civil cases are found in the Federal Rules of Civil Procedure, Rules 27-37. There is much conflict in the decisions as to the right under them to discover material collected by the attorney of the opposing party in the preparation of the case for advice or for trial. Privileged matter is exempt from discovery, but is evidence privileged which is collected by the attorney and his investigators or is communicated to the attorney by persons other than his client? Where the investigation is made for a party by his servants and the results are by them at his direction communicated to the attorney, the attorney-client privilege may be applicable. But it does

him in lamenting that hundreds of thousands of railroad workers and organized labor were not accorded an opportunity of expressing their views before the amendment was released.

Unfortunately, the "negative approach" of the language used in the proposed amendment may suggest that, *prima facie*, benefit of discovery is to be denied unless the applicant establishes affirmatively that discovery would not be unfair. Indeed, Mr. Armstrong concedes that the unfortunate form of the language of the amendment will probably encourage the argument "that the amendment is a further immunity to discovery in addition to the privilege accorded a lawyer under Hickman v. Taylor". (See Armstrong, supra, at XXXVII.)

It is strenuously urged that in view of the avowed purpose of the amendment, namely to *broaden* discovery, rather than to limit it, the proposed amendment should be modified before approval, to conform with that avowed purpose, lest the gesture of the Advisory Committee to these thousands of workers prove to be a serpent instead of a fish, or a Trojan horse rather than an aid. Discovery should normally be allowed as of right, unless the *party objecting* to disclosure *affirmatively* proves that to allow discovery would be unfair.

not cover material otherwise assembled by investigators acting at the direction of the attorney. Granting that a claim of the privilege could not be sustained if the material were produced and offered at the trial, is it nevertheless privileged against pre-trial discovery? The United States district judges have frequently refused to grant discovery of such material without basing the refusal upon privilege. The six judges of the District Court for Eastern Pennsylvania, sitting in banc, ruled that discovery of such material must be given. On appeal, the Court of Appeals for the Third Circuit, all six judges sitting, reversed and held that the material was privileged from discovery, saying: . . ."

After quoting from the opinion of the Circuit Court in this case, Mr. Morgan continues:

"The Court conceded that this 'is open to the gibes of the cynical,' but 'we believe it is sound policy; we know that it is irrefutably established in the law.' *Certainly this is an expansion of the attorney-client privilege which finds no justification in the language of any of the rules.* Whether it should be created by express language is a matter on which there is sharp disagreement among judges and lawyers. The real issue is the extent to which our adversary system of litigation shall be permitted to work to the advantage of parties able and willing to employ skillful and diligent counsel and to make expensive investigations over those who through ignorance or lack of funds or both must be satisfied with less. So long as the courts must depend upon the parties to frame the issues, produce the relevant material and present it to the trier of fact, so long will it be necessary for them to prevent the merely slothful from appropriating the fruits of the labor of the diligent. *But surely no rule of thumb which either permits the wise and*

diligent to work injustice or encourages the foolish and lazy to expect profit from their folly and indolence should be enacted.. The supposed necessity for a rule of thumb assumes trial judges to be weak or incompetent or both." (Italics supplied)

Apart from the cases cited in the brief of petitioner which reject the view of the lower court, we would also like to cite WILD v. PAYSON, Fed. Rules Service, Vol. IX, 34.411, Case 4 (1946), and DUGGER v. BALTIMORE O. R. CO., 5 F.R.D. 334, (D.C.E.D., N.Y., 1946). In both of these cases, district courts, under similar circumstances, refused to follow the rule of the Circuit Court in this case, rejecting it as being unsound.

CONCLUSION

Railroad employees of interstate carriers depend almost entirely upon the Federal Employers' Liability Act and kindred statutes for redress in occupational injuries. The practical consequences, to these workers, of the decision below cry out their own lament and protest: Those consequences render their rights under those federal statutes empty mockery. Already defendant railroad in this very case is striving to pull a dark veil of secrecy over every single fact it can collect. If the decision below is approved, all inhibition against concealment will have vanished, and with it, the discovery rules themselves.

It is submitted that there is no warrant in past authority or in principle for the lower court's extension of the attorney-client privilege, that this extension is in violation of the letter and spirit of the discovery rules, and that, according to the Advisory Committee, itself, the lower court's decision defeats, without warrant, the intended purpose and meaning of the rules. In the name of hundreds of thousands of injured railroad employees of today and tomorrow, we urge that the decision of Court below be re-

versed to the extent that it restricts the scope and freedom of discovery rules.

Respectfully submitted,

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